SUMMARY OF ARGUMENT

Several erroneous decisions by the trial court with regard to the Tennessee Rules of Civil Procedure are straightforward. The defendants/appellees filed a *Motion to Dismiss*. That motion and its three attached affidavits were presented to and considered by the Chancellor, triggering the right of plaintiff/appellant ("Green") to proceedings for summary judgment pursuant to Rule 12.02, TN.R.Civ.P., which right was precluded by immediate entry of the *Final Decree*. The *Final Decree* was improperly entered piecemeal, incorporating material unknown to the file and incorporating surprise declaratory and unsupported injunctive relief in favor of the defendants. The *Final Decree* declares that Green's *Motion for Temporary Injunction* "was properly denied" although the findings of fact and conclusions of law required by Rules 52.01 and 65.04, TN.R.Civ.P. were never entered and the ruling was actually on Green's *Petition for Restraining Order*. The trial court denied Green's *Motion to Alter or Amend*, and instead reaffirmed the *Final Decree*.

The trial court's reaffirmation of the *Final Decree* must be juxtaposed to the Record, which indicates that Jodi Jones and her mother (Polaha) and her nearest neighbor (Jondahl) collaborated to use their positions as vice-president/newsletter-editor, secretary, and treasurer respectively to improperly seize presidential authority by publishing false announcements that Green had been deposed as president of Southside Neighborhood Organization. The defendants have improperly equated their personal will with the will of Southside Neighborhood and its Organization.

Southside Neighborhood Organization has taken no legitimate action whatsoever to remove Green from office. Only the *Final Decree* has accomplished that result.

The SNO *Bylaws* dictate that membership may only be obtained after signing a pledge

to support the *Bylaws*. Such a signed pledge creates a reciprocal contract amongst all members. The *Bylaws* mandate that “[t]he rules contained in ‘Robert’s Rules of Order, Revised’ **shall govern** all questions not specified in these Bylaws” [bold added]. Not only those rules but also the common law principles of good faith and fair dealing have been flouted by the defendants, and the trial court has refused to address those issues.

"An office is as much a species of property as anything which is capable of being held or owned, and to deprive one of it, or unjustly withhold it, is an injury which the law can redress in a manner as ample as it can any other wrong."

Remand without further remedial action by the Court of Appeals would be contrary to judicial economy and to the interests of justice, as time is of the essence in this civil action.

* * * * *

Appellant apologizes for this *pro se* Brief’s shortcomings.

ARGUMENT

1. The defendants/appellees have locked down their position :

> MR. SHERROD : ... So we had a hearing. ...
> MR. SHERROD : And we have a problem with him trying to bully his way in, you know, an issue that he's really just not wanted and it doesn't matter why. **So that would be our position**, and hopefully the Final Decree entered stands for what it says, and if he wants to appeal it to the Tennessee Court of Appeals, you know, I can't stop that but I think that's really his next step.

Tr. 11, line 13; Tr. 13, lines 7-13 [bold added]. The plaintiff/appellant ("Green") challenges the validity of that position.

2. Elections are the bedrock of any democratic system. Green won election to a definite two year term as the president of Southside Neighborhood Organization ("SNO") by a commanding margin and thereafter diligently fulfilled all the enumerated duties of that office, including the impartial administration of parliamentary law required by Robert's Rules of Order, Newly Revised (10th ed.) ("RONR"; crucial pages of which are attached as Addendum 1-9) so as to protect the interests of minorities and absent members. (*Complaint* R2, ¶4). When the defendants/appellees (hereinafter often "Jones et al.") were unable to continue using SNO as their "bridge club" (Tr. 10, line 14) and "a private club of neighbors that don't want you in it" (Tr. 12, lines 4-5), they took dramatic, but ineffectual action. Jones et al. continue to refuse to acknowledge that removal of Green from his elected office necessitates quasi-judicial forms and proceedings.

> "An office is as much a species of property as anything which is capable of being held or owned, and to deprive one of it, or unjustly withhold it, is an injury which the law can redress in a manner as ample as it can any other wrong." ...
>
> In Nelson V. Sneed 112 Tenn. 36, 83 S.W. 786, it is said: "The right to hold an office, and receive and enjoy its emoluments, and exercise its functions, is an incorporeal right." ...

> Whenever an act of the assembly, therefore, is a decision of titles between individuals or classes of individuals, although it may purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right, which is **not a legislative, but a judicial, function**. It may not be easy to distinguish these powers, and to define each, [***91] so that an act shall be seen at once to be referable to the one or the other. But I think that where a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, **the destruction of the old one in the former is by sentence**.

Malone v. Williams, 118 Tenn. 390, 467, 468, 470; 103 S.W. 798, 818, 819; 1907 Tenn. LEXIS 57, 87, 88, 90-91 (decided on constitutional grounds);[bold added]. The defendants have not shown that the principles above should apply only to *public* office, and by their purported official actions they have repudiated the essential distinctions between executive, legislative, and judicial functions.

3. The SNO *Bylaws* (attached as Addendum 10-13) in no way suggest any ecclesiastical status which, pursuant to the *1st Amendment* to the *Constitution of the United States,* might preclude a court from addressing these issues. Had the trial court entered an order simply dismissing this civil action (as for an ecclesiastical dispute), Green would have remained free to continue urging the general membership of SNO to adopt a resolution correcting the defendants – who by announcing that Green has been summarily removed as SNO president have wrongfully equated their will with the will of SNO. By suddenly entering the *Final Decree* with its surprise declaratory and injunctive relief in favor of Jones et al., the trial court removed Green from office when SNO had not, and blockaded any effort by Green to further enlighten and rally the SNO general membership on the matter. By entering the *Final Decree*, the trial court both facilitated further abuses by Jones et al. (see *Supplemental Affidavit of BMG*, R119-120, ¶5) and greatly complicated the issues on appeal. An effort will here be made to delineate those manifold issues.

THE CONTRACTUAL ELEMENT TO THE BYLAWS

4. Had Jones et al.'s *Motion to Dismiss* been dealt with properly, the trial court would have had no reasonable alternative to denial of that motion. The *SNO Bylaws*, being Exhibit One to the *Complaint*, were admitted by Jones et al. (R39, ¶2; R76, ¶2). Those *Bylaws* clearly constitute an express reciprocal contract amongst all SNO members, in that membership requires "**signing a pledge** of support for the goals and organization **bylaws**..." (R8, ¶ MEMBERSHIP)[bold added]. A reciprocal contract is created by "[o]bligations assumed and imposed by two parties as mutual and conditional upon the other party assuming same obligations." (Webster's New World Law Dictionary © 2010 by Wiley Publishing, Inc., Hoboken, New Jersey). The prerequisite 'pledge of support' goes beyond a mere 'statement of support' in that a 'pledge' amounts to a solemn promise extending into the future. All defendants have admitted SNO membership (R39, ¶2; R76, ¶2) which entails execution of the reciprocal pledge to support the *Bylaws*, which *Bylaws* explicitly dictate that "[t]he rules contained in "Robert's Rules of Order, Revised" **shall govern** all questions not specified in these Bylaws." (R11, ¶ AUTHORITY)[bold added]. RONR has been used by the Organization since 2009 because it automatically supplants all previous editions, pursuant to RONR, page ii. (R2, ¶ 2; see Addendum 1). Therefore, at least regarding questions of due process or similar great consequence, members are obligated to assent to RONR in every matter not fully explicated in the text of the *Bylaws*. Yet even were RONR not incorporated into the *Bylaws*, reasonable common law standards still apply.

> It is well settled in Tennessee that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." Covington v. Robinson, 723 S.W.2d 643, 645 (Tenn. Ct. App. 1986) (citing Restatement (Second) of Contracts § 205 (1979); Winfree v. Educators Credit Union, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995) (quoting 17 Am. Jur. 2d Contracts, § 256 (1964))

> Our Supreme Court discussed the nature of the duty of good faith in Wallace v. National Bank of Commerce, 938 S.W.2d 684 (Tenn. 1996):
>
> > In Tennessee, the common law imposes a duty of good faith in the performance of contracts. . . .

Dick Broadcasting Co., Inc. of Tennessee v. Oak Ridge FM, Inc., et al No. E2010-01685-COA-R3-CV @12; 2011 Tenn. App. LEXIS 564 @23. Those reasonable common law standards of good faith and fair dealing have repeatedly been held also to include Robert's Rules in an organizational setting. Green's filed verified pleadings, verified motions, and affidavits abundantly demonstrate that Jones et al. acted methodically to circumvent the due process requirements specifically set forth in RONR, to disregard the text of the *Bylaws*, to disdain SNO's general election of Green as president for a definite term of two years, to deal with Green unfairly even by common law standards, and to wrongfully proclaim Jones president. The defendants acting in concert have shunned their duty of good faith and fair dealing with regard to the express reciprocal pledge to support the *Bylaws*.

SNO HAS NOT ACTED

5. On 9 August 2011 and again on 2 November 2011, the trial court failed to comprehend that Green has made no allegations against the neighborhood Organization. Green's pleadings are directed only against the **individuals** who concerted the improper Sunday 26 June 2011 gathering at which Jones first pretended to the office of president. The trial court's misconception is reflected in the Chancellor's statements to Green on 5 November 2011 : "And just very candidly and very frankly, for whatever reason, the Southside Neighborhood Association did not want Mr. Green as its President and it did not want him as a member." (Tr.16, lines 13-16). However, the Record contains no valid SNO document which would support the Chancellor's assessment, for SNO has not spoken on the subject although Jones et al. have distributed ineffectual documents wrongfully purporting to be SNO documents. The misuse of SNO stationary does not a SNO document make. The

affidavits of Jones, Polaha, and Jondahl which are incorporated into the *Motion to Dismiss* are not SNO documents. In no way has Green asserted that SNO has taken any action against him. Clearly, Mr. Sherrod's assertions on 2 November 2011, to which Green objected for lack of foundation in the record (Tr. 12, lines 6-10; Tr 13, lines 20-23), erroneously influenced the trial court.

6. The trial court's *Final Decree*, not SNO, removed Green from office. Yet the specific facts found in the Record (please see the extensive citations to the Record set out in the Statement of Facts) clearly demonstrate that :

(1) Polaha/Jones/Jondahl have acted only as collaborating ***individuals*** (mother/daughter/nearest neighbor), and without the authority of SNO, against Green.

(2) SNO has taken no action against Green, either to remove Green as president or to terminate Green's SNO membership.

(3) Green may not be removed from office except after appointment of an investigating committee, after adoption of charges and specifications against him, after reasonable time to prepare a defense, after a full and fair trial (RONR p. 643, lines 6-14; Addendum 9) and after the "*Assembly's Review of a Trial Committee's Findings*" (RONR p. 640-641, lines 26-14; Addendum 8), none of which occurred.

(4) there has been no valid meeting of the SNO Executive Board due to lack of a quorum and due to lack of notice to every Board member. See RONR p. 469, lines 24-29; Addendum 7. Green's earlier statement that an ambiguity exists in the *Bylaws* regarding the composition of the Board was incorrect ; there is no ambiguity between *X & Y "shall compose the Executive Board"* and *"[t]he Executive Board shall consist of " X, Y, & Z*, in that "shall compose" means 'shall arrange into good order' or 'shall make calm' and is different from 'shall be composed of' or "shall consist of."

(5) even if there had been a valid meeting of the Board, neither the *Bylaws* nor RONR permit the Board to remove an officer without cause and without trial.

(6) even if the *Bylaws* permitted the Board to remove an officer without cause or trial, that Board action is of no effect unless reconsidered and ratified ["reviewed"] at the next meeting of the general membership. (RONR p. 640, line 26 et seq., Addendum 8; *Bylaws* p. 3, 2nd¶, Addendum 12).

(7) there was no reconsideration or ratification of the purported removal by the Board of Green as president, but there *was* a vote in excess of 1/3 to censure Jones for misrepresenting an improper action by a few individuals as a valid action of the Board. That 1/3 vote to censure made impossible the 2/3 vote necessary to rescind Green's election even if the *Bylaws* permitted the same, which they do not.

(8) Green's SNO membership may not be terminated except after appointment of an investigating committee, after adoption of charges and specifications against him, after reasonable time to prepare a defense, after a full and fair trial, after ratification by the general membership and a separate vote on imposition of a penalty, none of which occurred.

7. Lest any of the points above appear to be trivial technicalities, belaboring just one factor provides perspective. Expedience tempts one to ask, "What possible difference could an omitted/absent Board member possibly have made?" The timeless tale of *The Emperor's New Clothes* presents a universal argument against the validity of any action attempted by the Board in the absence of a quorum or in absence of notification to every Board member. ~ On that renowned day when the emperor paraded through the streets in his 'new clothes' the crowds (seized with fear and self-doubt) cheered the emperor and his extraordinary tailor, until one small boy naively exclaimed that the emperor was absolutely nude. That boy's genuine observation suddenly liberated the entire crowd, resulting in complete reversal of public

opinion (and humiliation of the emperor). ~ Recognition that even the most inconspicuous member may on any occasion prove to be the crucial catalyst underpins RONR's mandate for a full quorum and for timely notification of each and every member. Recognition of these principles is so widespread that rarely does any board dare to circumvent them ; hence reported cases on the issue are almost unknown.

TRIGGERING OF RULE 56 ; JENNINGS v. SEWELL

8. The defendants incorporated affidavits into their *Motion to Dismiss*, and those were considered by the Chancellor, triggering the mandatory provision of Rule 12.02, TN.R.Civ.P. that "... all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Green had no way to know that the defendants' affidavits would not be excluded, and that the *Motion to Dismiss* might be treated as one for summary judgment. The defendants had not complied with the minimum requirements specified under Rule 56, TN.R.Civ.P,, and the 30 days established by Rule 56.04 were not allowed to Green for hearing preparation. In both the verified *Plaintiff's Motion for Temporary Injunction* and the verified *Plaintiff's Motion for Supplemental Pleadings*, Green indicated the need for discovery by protesting the "obfuscating nature of these Affidavits [of Jones et al.]" (R62-64, ¶3-5; R69, ¶3-5) as well as Polaha's refusal to provide SNO documentation essential to this civil action (R107, ¶9; R120, ¶6; R124); for this reason alone, Rules 56.08 and 56.07, T. R. Civ.P., suggest that immediate entry of the *Final Decree* was unwarranted. Yet, assuming only for the purpose of argument that all prerequisites had been fulfilled and the *Motion to Dismiss* was properly treated as a motion for summary judgment, entry of an order which in effect awarded summary judgment to Jones et al. was improper in the absence of a proper record, as Green pointed out (Tr. 6, lines 14-25, Tr. 7, lines 1-4) to the trial court on 2 November 2011 by citing Jenning v. Sewell.

> [T]he appellate record in this case is inadequate to determine the basis for the appellee's motion or the trial court's judgment....
>
> An appellant has the responsibility to prepare a fair, accurate, and complete record on appeal. An appellee, however, also has a responsibility to ensure the appellate record is adequate, particularly when summary judgment has been granted in its favor. The appellate record is inadequate for us to determine the basis for either the appellee's motion or the trial court's judgment.

Jennings v. Sewell Allen Piggly Wiggly, No. W2002-01663-SC-R11-CV @1, 4; 173 S.W.3d 710 (Tenn. 2005), 711, 713; 2005 Tenn. LEXIS 825, 1, 9-10.

> Following the reasoning of Jennings and Svacha, we are inclined to conclude that, given the failure of the appellant to provide an adequate record, the appellees should have made sure that the record contained all proof considered by the court in granting their motions for summary judgment. This evidence would then be part of the record on appeal, so this court could perform its duty.

Range v. Baese, No. M2006-00120-COA-R3-CV @5; 2008 Tenn. App. LEXIS 28 @11.

Additionally, because of the 23 June 2011 filing date for this civil action, Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008) ; 2008 Tenn. LEXIS 792, governs any summary judgment proceeding initiated by the defendants. Tennessee Code Annotated §20-16-101 did not supplant Hannan until 1 July 2011. Furthermore, as Green argued at the Rule 59 hearing (Tr. 7, lines 4-11), had the trial court properly considered only Green's pleading (and proposed supplemental pleading) but nothing more, the standard of review would not have been the new federal Twombly/Iqbal "plausibility" pleading standard.

> We decline to adopt the new Twombly/Iqbal "plausibility" pleading standard and affirm the judgment of the Court of Appeals
>
> ...Thus, as we observed in Leach,
>
> > "While a complaint in a tort action need not contain in minute detail the facts that give rise to the claim, *it must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the

> theory suggested . . . by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial*."
>
> 124 S.W.3d at 92 (quoting Donaldson v. Donaldson, 557 S.W.2d 60, 61 (Tenn. 1977))(alteration in original); accord Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 399 (Tenn. 2002). Moreover, courts are not required to accept as true assertions that are merely legal arguments or "legal conclusions" couched as facts. Riggs v. Burson, 941 S.W.2d 44, 47-48 (Tenn. 1997)

Pam Webb v. Nashville Area Habitat for Humanity, Inc. No. M2009-01552-SC-R11-CV @1, 5. 346 S.W.3d 422, 422, 427; 2011 Tenn. LEXIS 623 @2, 10-11. Moreover, assuming only for the purpose of argument that the trial court's decisions were all correct and that a genuine trial was conducted in the few available minutes (see R146), the trial court's failure to enter a complete order requires that the judgment be vacated.

> After a trial, the trial court dismissed the plaintiffs' complaint and the defendants' counter-complaint. However, the trial court failed to issue written findings of fact and conclusions of law as required under Rule 52.01 of the Tennessee Rules of Civil Procedure. We vacate the trial court's judgment and remand the cause to the trial court for written findings of fact and conclusions of law.

Terry Lake and Linda Ousley v. Louis Haynes, Barbara Haynes and Running Bear Construction, No. W2010-00294-COA-R3-CV @1; 2011 Tenn. App. LEXIS 304 @1-2.

9. Nevertheless, since all proof was by filed affidavits, the Court of Appeals may now treat the defendants' *Motion to Dismiss* as a motion for summary judgment (in which case the possibility of judgment against the defendants arises).

> Since matters outside the pleadings were considered by the Trial Court when resolving this particular issue, we will treat the Bank's motion to dismiss as a motion for summary judgment in accordance with Tenn. R. Civ. P. 12.02.3. In Teter v. Republic Parking System, Inc., 181 S.W.3d 330 (Tenn.2005), our Supreme Court recently reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. The Court stated:
>
> > The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed

> issues of fact. Bellamy v. Fed. Express Corp., 749 S.W.2d 31, 33 (Tenn.1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. See Tenn. R. Civ. P. 56.04; Penley v. Honda Motor Co., 31 S.W.3d 181, 183 (Tenn.2000); Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn.1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn.2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. See Mooney v. Sneed, 30 S.W.3d 304, 306 (Tenn.2000); Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn.1995).
>
> Teter, 181 S.W.3d at 337.

Smith Mechanical Contractors, Inc. v. Premier Hotel Development Group, et al., 210 S.W.3d 557, 562-563; 2006 Tenn. App. LEXIS 468 @ 14-15 ; No.E2004-03016-COA-R3-CV (July 12, 2006). See also Dorothy King et al. v. Virginia Betts et al., 354 S.W.3d 691, 711-712; 2011 Tenn. LEXIS 1065 @ 44-45; No. M2009–00117–SC–R11-CV. Had the trial court considered the defendants' *Motion to Dismiss* as a motion for summary judgment, the option of granting summary judgment to Green was not forbidden.

> Although this Court has not previously spoken on the subject, we are [**9] of the opinion that a trial judge may grant a motion for summary judgment in favor of a nonmoving party, or parties, as was done here. See 6 Moore's Federal Practice, § 56.12. We are of the opinion, however, that such action on the part of the trial judge should be taken only in rare cases and with meticulous care.

Thomas v. Transport Ins. Co., 532 S.W.2d 263, 266 (Tenn. 1976)

> Further, HN3 summary judgment may be granted in favor of the non-moving party, although this Court has cautioned that such a grant "should be taken only in rare cases and with meticulous care." Thomas v. Transp. Ins. Co., 532 S.W.2d 263, 266 (Tenn. 1976). Generally, the non-moving party should prevail only when "the requirements of Rule 56 are met and no prejudice is shown to the

> original movant." March Group, Inc. v. Bellar, 908 S.W.2d 956, 959 (Tenn. Ct. App. 1995)

Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 374 (Tenn. 2007). Based upon the admissions and affidavits in the record, had there been a summary judgment hearing the trial court should have denied the defendants' motion and considered granting summary judgment to Green.

NO EXECUTIVE COMMITTEE; LIMITED POWER OF THE BOARD

10. At the hearing on the defendants' *Motion to Dismiss* the filed affidavits of Jones et al. were considered by the trial court ; those affidavits refer only to action by the Executive **Committee**, which is an entity recognized by RONR as a possible and powerful subset of the Executive **Board**. However, nothing in the Record demonstrates that any executive committee is authorized by SNO, and in fact, contrary to the averments of the defendants, no SNO executive committee may exist. "A board cannot appoint an executive committee unless the bylaws so authorize." (RONR, pg. 468, lines 26-27). Nor does the Record demonstrate that SNO has given any authority in its *Bylaws* for the Executive Board to convene of its own accord. Again, RONR fills in the gaps in the *Bylaws* :

> The section of the bylaws that authorizes the calling of special meetings (**without which special meetings cannot properly be called;** see page 558) should prescribe :
> 1) by whom .....

RONR, pg. 89, lines 25-29.[bold added]; Addendum 3.

> A board within an organized society is an instrumentality of the society's full assembly, to which it is subordinate.

RONR, pg. 9, lines 5-7.

> If a society is to have an executive board, the bylaws should specify the number of board members and how they are to be determined, should define the board's duties and powers, and should make provisions for meetings of the board as stated above.

RONR, pg. 465, lines 8-12; Addendum 5.

> A society has no executive board, nor can its officers act as a board, except as the bylaws may provide; and when so established, the board has only such power as is delegated to it by the bylaws or by vote of the society's assembly referring individual matters to it.

RONR, pg. 465, lines 26-30; [bold added]; Addendum 5.

> Usually in organizations meeting monthly or oftener, and sometimes in those meeting quarterly, the board is not given so much power, since the society can attend to much of its business at regular meetings. (...) In any event, **no action of the board can conflict with any action taken by the assembly of the society;** ...

[such as an election]. RONR, pg. 466, lines 1-9; [bold added]; Addendum 6.

By not providing for regular or special meetings of the Executive Board, the *Bylaws* demonstrate an intent that the Board convene only upon the specific instructions of the SNO assembly, or at the Board's own risk to take emergency action which becomes fully valid only upon explicit ratification of both the action and the meeting itself at the next regular monthly meeting of the SNO general membership. SNO thus holds in check the power of its Board. Nor does the Record suggest that the Board possesses any authority to make its own rules, to accept absentee votes, or to reverse the results of a SNO general election.

ONLY THE PETITION FOR TRO WAS DENIED

11. Reaffirmation of the *Final Decree* on 4 November 2011 indicates that the trial court failed to apprehend that the Hon. Thomas Seeley considered and denied Green's *Petition for Restraining Order* **rather than** his *Motion for Temporary Injunction*. The *Final Decree* addresses the issue only in the past tense without any findings of fact or conclusions of law : "... from all of which it appears that Plaintiff's Request for a Temporary Injunction **was** properly denied;" (R85 ; repeated on R86, ¶2)[bold added]. Green called the court's attention to that error : "To the best of my knowledge, my request for a temporary injunction has never been

presented to any Judge. And I also note that Rule 65 requires that in granting or denying such a request that findings of fact and conclusions of law be entered into the record." (Tr. 4, line 1-6).

The applicable rules are straightforward.

> (6) Findings of Fact and Conclusions of Law. In granting, denying, or modifying a temporary injunction, the court shall set forth findings of fact and conclusions of law which constitute the grounds of its action, as required by Rule 52.01.

Rule 65.04, TN.R.Civ.P. The Court has elaborated on the new Rule 52.01 :

> Rule 52.01 of the Tennessee Rules of Civil Procedure, as amended effective July 1, 2009, provides as follows:
>
> > *In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law* and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6).
>
> TENN. R. CIV. P. 52.01 (emphasis added). Thus, as we have noted previously, "Rule 52.01 of the Tennessee Rules of Civil Procedure, as amended, requires trial courts to issue findings of fact and conclusions of law in all actions tried upon the facts without a jury." Clement Homes, Inc. v. Chilcutt, No. W2009-02277-COA- R3-CV, 2010 WL 2812574, at *2 (Tenn. Ct. App. Jul. 16, 2010 (citing TENN. R. CIV. P. 52.01). The amendment to Rule 52.01, making the issuance of findings of fact and conclusions of law mandatory, became effective on July 1, 2009. Clement Homes, Inc., 2010 WL 2812574, at *2.
>
> ... Appellate review demands a detailed examination of the trial court's findings as to each specific item or event that the parties dispute. That is not possible in the absence of specific findings of fact and conclusions of law by the trial court.
>
> However, tempting it may be to enter a cursory order without findings of fact and conclusions of law in order to "get[ ] rid of this thing," Rule 52.01 mandates such findings. Moreover, they are necessary to give the parties the resolution they need.

No. W2010-00294-COA-R3-CV @7-8; 2011 Tenn. App. LEXIS 304 @14. At the Rule 59 hearing, the trial court again failed to realize that if Green's *Motion for Temporary Injunction* had been "properly denied" the record would have contained an order of denial consistent with Rules 65.04(6) and 52.01, TN.R.Civ.P. Clearly, Mr. Sherrod's assertions as reiterated in Jones et al.'s response filed during the hearing on 2 November 2011 erroneously influenced the trial court : "[W]hile the Honorable Chancellor, Richard G. Johnson was ill ... Green submitted his request for injunctive relief to the Honorable Tom Seeley, who rejected his request for a temporary injunction." (R133, ¶ 9). The technical Record contradicts such assertions. (e.g., please see R37 and Green's *Response*, R60, ¶11). Additionally, Green here avers that he has had no direct communication or contact with Judge Seeley.

NO NOTICE OF CONSOLIDATION

12. Assuming only for the purpose of argument that Green's *Motion for Temporary Injunction* had been presented to the Chancellor on 9 August 2011, proceeding to trial immediately was erroneous. The Court has explained that

> The Tennessee Rules of Civil Procedure provide:
>
> > **Consolidation of Hearing with Trial on Merits**. Before or after the commencement of the hearing of an application for a preliminary injunction, the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision [65.04(7)] shall be so construed and applied as to save to the parties any rights they may have to trial by a jury.
>
> Tenn. R. Civ. P. 65.04(7).
>
> It is undisputed that the trial court in this case did not order a Rule 65.04(7) consolidation, nor did it provide notice to the parties of an intent to consolidate the hearings. Although Rule 65.04(7) clearly establishes that it is within the authority of the court to order an application for

> temporary injunction consolidated with a hearing on the merits, it may not exercise such authority without notice to the parties. Johnson v. City of Clarksville, No. M2001-002273-COA- R3-CV, 2003 WL 21266937, at *3 (Tenn. Ct. App. June 3, 2003) (no perm. app. filed)(citing Oak Ridge FM, Inc., v. Wicks Broadcasters, Ltd., No. 03A01-9409-CH-00318, 1995 WL 40303 at * 3 (Tenn. Ct. App. Feb. 1, 1995)). Notice of the issues to be tried is fundamental to the judicial process, and parties are entitled to such notice in advance of the trial date. Id.; Sunburst Bank v. Patterson, 971 S.W.2d 1, 6 (Tenn. Ct. App.1998). The United States Supreme Court has addressed the identical language of Fed. R. Civ. P. 65(a)(2), opining: "[b]efore such an order [of consolidation] may issue, however, the courts have commonly required that 'the parties should normally receive clear and unambiguous notice . . . either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.'" Johnson, 2003 WL 21266937, at *3 (citing University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (quoting Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1057 (C.A.7 1972))). We agree with Mr. Darnell that, in so far as the trial court consolidated the hearing on temporary injunction with a hearing on the merits, it was error for the trial court to dismiss the case without a Rule 65.04(7) order of consolidation or notice to the parties allowing them sufficient time to prepare for a hearing on the merits

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No. W2006-01084-COA-R3-CV @3-4; 2007 Tenn. App. LEXIS 56 @8-9. Similarly, the Tennessee Supreme Court has stated :

> Rule 65.04(7) of the Tennessee Rules of Civil Procedure permits a trial court to consolidate a preliminary injunction hearing with the trial of the action on the merits. Rule 65.04(7) provides in pertinent part:
>
> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application· This subdivision [65.04(7)] shall be so construed and applied as to save the parties any rights they may have to trial by a jury.
>
> The United States Supreme Court has examined the identical language of Rule 65(a)(2) of the Federal Rules of Civil Procedure. Univ. of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Federal case law interpreting rules similar to those adopted in this state are persuasive authority for purposes of construing the Tennessee rule. Harris v. Chern, 33 S.W.3d 741, 745 n. 2 (Tenn.2000). The Supreme Court has held that before a trial court may issue an order of consolidation the court must provide the parties with " 'clear and

> unambiguous notice · either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.'" Univ. of Texas, 451 U.S. at 395, 101 S.Ct. 1830 (quoting Pughsley v. 3750 Lake Shore Drive Coop. Bldg., 463 F.2d 1055, 1057 (7th Cir.1972)). Similar to those courts construing the federal rule, **we conclude that a court must provide the parties with notice before issuing an order of consolidation in accordance with Rule 65.04(7) of the Tennessee Rules of Civil Procedure.**
>
> The trial court in the present case did not order consolidation or provide notice to the parties of its intent to consolidate the hearings.

Clinton Books, Inc., v. City of Memphis, No. W2003-01300-SC-R11-CV @5-6; 197 S.W.3d 749, 755; 2006 Tenn. LEXIS 313 @14-15; [bold added].

> The matters at issue pertain to the concept of due process of law, which requires in part that litigants be provided reasonable notice of the trial date and an adequate time to prepare for trial. Roden v. McBee, C.A. No. 879, 1989 WL 128283, at *2 (Tenn. Ct. App. Oct. 30, 1989). As the United States Supreme Court has stated, reasonable notice is a fundamental requirement of due process. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In furtherance thereof, the Supreme Court of Tennessee has consistently held that notice is a basic protection arising from due process. See Keisling v. Keisling, 92 S.W.3d 374, 377 (Tenn. 2002); State v. Pearson, 858 S.W.2d 879, 884 (Tenn. 1993).

Daniel Music Group, LLC v. Tanasi Music, LLC, et al , No. M2005-02217-COA-R3-CV (March 30, 2007); 2007 Tenn. App. LEXIS 183 @ 7-8; (holding that under the uncommon circumstances 21 days was sufficient notice for consolidation). – Similarly but on a previous topic (re: ¶4 above), RONR suggests that 30 days generally provide sufficient notice of the trial date for an officer or a member formally charged with serious wrongdoing by an organization. Jones et al. purport to have deposed Green in less than three business days.

IMPROPER ENTRY OF MANDATORY INJUNCTION

13. The *Final Decree* includes a mandatory injunction compelling Green to deliver within less than 48 hours "all property on the attached list" to Jones. At the time the *Final*

Decree was entered, neither the record nor the file contained the purported list. After entry of the signed *Final Decree*, a naked list unaccompanied by any cover sheet or instructions was faxed to the Clerk & Master from Mr. Sherrod's office, and was thereafter attached to the previously entered *Final Decree*. Assuming only for the purpose of argument that the list had been previously filed with the trial court, entry of a mandatory injunction in the absence of any supporting pleadings, motion, or evidence was nevertheless erroneous.

> [T]he Supreme Court has recently reiterated the familiar four-factor test that a plaintiff seeking a permanent injunction must satisfy before a court may grant such relief: A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. eBay Inc. v. MercExchange, L.L.C., U.S. , 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641 (2006).
> .....
> The Court agrees that Metro is not entitled to a permanent injunction, because it has not shown that it has suffered an irreparable injury or that monetary damages are inadequate to compensate it for any damages incurred.

Metro. Gov't of Nashville v. BellSouth Telcomms., Inc., 502 F. Supp. 2d 747, 759 (M.D. Tenn. 2007). See also Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., Inc., 2007 U.S. Dist. LEXIS 38020 (M.D. Tenn. May 24, 2007). None of the essential four factors for a mandatory injunction were at any time addressed by Jones et al. Nevertheless, the defendants incorporated the unsupported mandatory injunction into their draft *Final Decree*, which was accepted by the Chancellor, signed, and entered the same day, thereby denying Green the ten days allowed to him for submission of an alternate order pursuant to the local rule governing entry of orders :

> The attorney drafting the order shall serve it upon opposing counsel for approval within ten (10) days of the Court's decision or jury verdict. Opposing counsel shall either 1) approve the order and submit it to the judge for signature ... or 2) submit an alternative order...

Rule 6.01.C, First Judicial District Local Rules of Practice. The *Final Decree* was entered in a manner which resulted in its omission from the *Chancery Docket* for this civil action (Exhibit B to *Filing of Transcript and Statement of the Evidence,* R147). The Record demonstrates convincingly that with regard to the content and entry of the *Final Decree*, the defendants and their attorney Howell Sherrod acted improperly and seriously misguided the trial court.

A CONSTELLATION OF IRREGULARITIES

14. The *Final Decree* makes cursory mention of "the stipulation of the parties" and "hearing the evidence introduced into open court." There was no stipulation; no evidence was heard; the Chancellor considered affidavits. The *Filing of the Transcript and Statement of the Evidence* (R144-145) contains no reference to any stipulation and confirms that no witnesses were sworn prior to entry of the *Final Decree*. At the Rule 59 hearing, the defendants were unable to delineate any stipulation or evidence even when prompted to do so.

> THE COURT: Well, let's stick to the proof that resulted in the Final Decree because Mr. Green's questioning it.
> MR. SHERROD: Anyway, Mr. Green's not been to any of the meetings since then. I mean it's a – it's not that he's banned from being present, he's just not going to be an officer and he's not going to be a member. And ..."

Tr. 12, lines 17-24. The trial court allowed the defendants to oppose Green's *Motion to Alter or Amend* despite their failure to comply with Local Rule 5.01 as more fully set forth in Green's *Motion to Consider Unopposed* (R128).

> LOCAL RULE 5.01, CIVIL MOTIONS
> Opposition to Motions. If a motion is opposed, a response to the motion must be filed. The response shall be in writing and shall state with particularity the grounds for the opposition. If no opposition to the motion is filed, **the motion will be considered unopposed.** Responses to motions, including any opposing affidavits, depositions or briefs or any matter being presented in opposition to the motion, must be filed and furnished to opposing counsel at least **two business days** in advance of the hearing.

Rule 5.01.B, Local Rules of the First Judicial Circuit [bold added]. The defendants filed their

response **after** the hearing began and only after being instructed by the Chancellor to do so. (Tr. 1, line 25, Tr. 2, Tr. 3, lines 1-7). Acknowledging that the local rules may be suspended so as to serve justice, Green asserts that justice has not been served by the defendants' multiple successful attempts to circumvent the rules of court; e.g., the *Final Decree* was precipitately entered in contravention of Local Rule 6.01.C and a naked list was faxed to the Clerk for belated attachment to the previously entered *Final Decree*. (re: ¶12 above).

15. Sherrod caused to be entered on 11 July 2011 the *Order* stating, "That Sherrod waives his right to countersue Plaintiff." (R73). On 26 July 2011 acting as attorney for all other defendants Sherrod filed an *Answer* and counterclaim stating : "WHEREFORE Defendants demand judgment against Green for compensatory and punitive damages in an amount not to exceed Fifty Thousand Dollars ($50,000.00) per person plus attorney fees and costs." (R80).

JUDICIAL ECONOMY AND EFFECTIVE JUSTICE

16. The Record contains no evidence except that submitted by affidavit, and those affidavits demonstrate that, more likely than not, before an impartial tribunal Green will prevail on the merits at trial. Therefore, in the interest of effective justice as well as of judicial economy, Green urges this Court to grant his *Motion for Temporary Injunction* after perusal of the Record. Defendants have asserted that Green's *Motion for Temporary Injunction* "was properly denied" although no order setting forth the required findings of fact and conclusions of law is to be found in the Record. The Court of Appeals possesses considerable discretion in these circumstances :

> HN1 The general rule that the appellate courts have a duty to render judgments which the lower court should have rendered, has long been established in this jurisdiction. See i.e., Toomey v. Atyoe, et al, 95 Tenn. 373, 32 S.W. 254 (Tenn. 1895), and Perry v. Carter, 188 Tenn. 409, 219 S.W.2d 905, (Tenn. 1949). ...
>
> HN3 T.C.A. § 27-3-125 provides:
>
> 27-3-125. Judgment on reversal. -- If the judgment or decree of

> the inferior court is reversed, the appellate court shall render such judgment or decree as should have been rendered in the inferior court, and shall issue execution without a procendendo, except where the damages to be assessed are uncertain, in which case the court, if of last resort, shall remand the cause for further proceedings. ...
>
> HN4 It is probable that T.C.A. § 27-3-125 has now been superseded by the Tennessee Rules of Appellate Procedure. Rule 36(a) T.R.A.P. provides in pertinent part as [**6] follows:
>
> > Relief; Effect of Error. -- (a) Relief To Be Granted; Relief Available. -- The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact.
>
> While we, under the general rule of Toomey, supra, are inclined to agree that judgment could and perhaps should, under ordinary circumstances, be granted in the appellate courts when the judgment of the trial court, sitting without the intervention of a jury, is reversed, we do not view the rule as mandatory. We believe the better view is that a remand for further proceedings is within the purview of judicial discretion, especially when issues have been left undecided by the trial court. This view is supported by the official comments to the text of the Advisory Commission comments to Rule 36(a), T.R.A.P. wherein it is said as the introductory remark: "Subdivision (a). This subdivision makes clear [**7] that HN5 the appellate courts are empowered to grant whatever relief an appellate proceeding requires."

First Tennessee Bank Nat'l Ass'n v. Hurd Lock & Mfg. Co., 816 S.W.2d 38, 40; 1991 Tenn. App. LEXIS 302, 4, 5, 6-7 (Tenn. Ct. App., May 8, 1991, Filed) The Court of Appeals has previously entered definitive judgments on motions up on appeal :

> In the interest of judicial economy, we will consider the merits of the motion for recusal rather than remanding the case for application of the proper standard under which this motion must be decided. Alley, 882 S.W.2d at 823 (stating that in the interest of judicial economy, the case will not be remanded to the trial judge to evaluate objectively the potential appearance of bias or prejudice).

Bean v. Bailey 280 S.W.3d 798, 805; 2009 Tenn. LEXIS 296 @ 19. See also Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn.1997)(holding that where all the proof is by deposition, appellate court may draw its own conclusions about credibility). In this civil

action, all proof is by affidavit, to which all parties have now had abundant chance to respond, and the defendants have (erroneously) asserted that the *Motion for Temporary Injunction* has already been "properly denied."

STATEMENT OF FACTS INCORPORATED

17. The Statement of Facts set forth on pages 9-13 of this Brief is incorporated by reference as if fully set forth in this Argument.

* * * * *

CONCLUSION and PRAYER FOR RELIEF

The Court of Appeals is asked to recognize that if this matter is simply vacated and remanded, Green (and those who elected him to office) will have been denied justice in that his term of office expires in January 2013 and it appears likely that the defendants will be able in the trial court to forestall a proper judgment on the merits until the issue becomes moot. Therefore, the appellant prays that the Court grant his motion for a Supplemental Complaint (embodied in *Notice of Hearing,* R115), his *Motion for Supplemental Pleadings* (R69), and his *Motion for Temporary Injunction* (R62). The appellant asks the Court to consider the possibility of entering summary judgment against the defendants. Should the Court decline to grant an injunction, Green prays for swift reversal and remand, with expedited discovery timetables and guidance for the trial court. Green asks for costs and discretionary expenses and all other relief which the Court deems warranted.

* * * * *